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DATO' TING CHECK SII

v.

GALAXY GRIP SDN BHD & ORS

B HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[SUIT NO: 22-111-2005-III (I)]
18 APRIL 2006

C ***CIVIL PROCEDURE:*** *Trial - Preliminary issue - Duty to begin with case - Application by plaintiff to declare alleged transfer of shares null and void - Defence pleading oral agreement that plaintiff holding shares only as trustee/ nominee - Whether case to be begun by defendants - Rules of High Court 1980, O. 35 r. 4 - Evidence Act 1950, s. 103*

D The preliminary issue that confronted the learned judge in this case is whether it was the plaintiff or the second, third and fourth defendants that ought to start the case. The facts were that the plaintiff had been a director and registered shareholder of the first defendant ('the company') since 1996, holding 55 shares or 55% of the shareholding thereof. In June 2005, a move was made by the above defendants E (apparently, the co-shareholders) to remove the plaintiff as a director by way of an Extraordinary General Meeting ('EGM') and to strip him of his shareholding. Upon enquiry, the plaintiff was informed by the defendants' accountant that the intended removal and stripping out could be effectuated, as the plaintiff had prior to the company's inception pre- F signed a blank transfer form transferring his entire shareholding to the third defendant. That apart, the plaintiff also discovered about the existence of two documents that bore his signature, namely the transfer form (Form 32A) and a Circular Resolution approving the share transfer in question. The plaintiff alleged that the documents were a forgery and G in the circumstances applied for declarations they were null and void and of no effect whatsoever.

The defendants' sole defence was that there was an oral agreement between the plaintiff and the third defendant that the plaintiff was holding H the shares as a trustee/nominee of the third defendant. Such being the defendants' allegation, and stand, the plaintiff applied for an order that the defendants start with their case first. According to the plaintiff, since the primary issue before the court was whether there was any truth in the defendants' allegation as to the oral agreement, the burden of I proving the issue must squarely fall on them. The defendants countered that there were other issues stemming from the plaintiff's statement of

claim, such as issues of forgery and conspiracy to defraud, and since the plaintiff must prove same, the case ought to be started by the plaintiff.

Held (ordering defendants to start with their case):

(1) The primary issue in this suit is whether or not the plaintiff is holding the 55 shares as trustee/nominee on behalf of the third defendant. There is no dispute that the legal and registered ownership of the 55 shares lies with the plaintiff and hence, there is *prima facie* evidence that the plaintiff is also the beneficial owner. In the circumstances, it is incumbent on the defendants to dislodge that evidence by proving that there is in fact an oral agreement that the plaintiff is the trustee/nominee for the third defendant. (para 10)

(2) The allegation of an oral agreement is made by the defendants relying on certain documents pre-signed by the plaintiff but which the plaintiff states as forgery. By s. 103 of the Evidence Act 1950, it is clear that a person who wishes the court to believe the existence of a particular fact (such as the defendants here) bears the burden of proving the same. (para 10)

(3) There is no merit in the defendants' contention that since the plaintiff had alleged forgery and conspiracy to defraud, the burden is on him to start the case and prove those allegations. Those allegations, which form part of the statement of claim, only came about after the plaintiff was served with the requisition of the EGM and from the results of the enquiry made by the plaintiff from the defendants' accountant concerning the status of his shares in the company. Clearly, the plaintiff could very well have only pleaded that he is the registered owner of the 55 shares and requested for the declarations sought for – in which case the defendants would then allege that there is an oral agreement based on the said documents. In such a circumstance, there is no doubt that the defendants would be requested to start their case. That scenario is no different to the present case except that the plaintiff, because of the discovery of the documents and taking a cautious approach, pleaded reasons why those documents cannot be relied upon by the defendants. (para 11)

(4) The defendants must first start to prove their claim that there is an oral agreement that the plaintiff holds 55 shares as trustee/nominee for the third defendant. (para 12)

[Order accordingly.]

Case(s) referred to:

Chong Chee Yan v. Germila Sdn Bhd & Anor [2001] 6 CLJ 8 HC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 103

Rules of the High Court 1980, O. 35 r. 4(1), (2), (6)

For the plaintiff - George Lo; M/s George Lo & Partners

For the defendants - Lim Heng Choo (William Yeo with him); M/s Lim & Lim Advocs

Reported by Rose Aziz

JUDGMENT

David Wong Dak Wah JC:

Introduction

[1] This is an application by the plaintiff's counsel for an order that the defendants start their case, which is to prove that the plaintiff is the trustee/nominee of the 55% of the issued and paid up capital of 1st defendant for the 3rd defendant pursuant to an oral agreement.

[2] The undisputed facts are these. The plaintiff is and always has been a registered shareholder in the 1st defendant holding 55 shares of the issued and paid up capital of the company. The 55 shares amount to 55% of the shareholdings in the 1st defendant which was incorporated on the 21 October 1996. On incorporation the plaintiff and the 3rd defendant were appointed the only two directors of the 1st defendant and have remained ever since. On or about 28 June 2005, the plaintiff received a Notice of Extraordinary General Meeting ("EGM") dated 17 June 2005 issued by the 2nd defendant notifying the plaintiff of an EGM to be held on 14 July 2005 to remove the plaintiff as director and to appoint the 4th defendant as director. The notice of EGM was issued upon the requisition of the 4th defendant claiming to hold 60% of the issued capital of the 1st defendant. The 4th defendant's requisition was also dated 17 June 2005. Upon receipt of the aforesaid notice the plaintiff started to make inquiries concerning the status of his shareholdings. Not satisfied by the answers given by the defendants, the plaintiff took out this suit and sought against the 1st, 2nd, 3rd and 4th defendants jointly and severally the following reliefs:

(a) a declaration that the Form 32A share transfer form and the Circular Resolution to approve the share transfer, are invalid, null and void and of no effect whatsoever;

(b) a declaration that all acts, deeds or things done by the 2nd, 3rd and 4th defendants or any of them pursuant to the said Form 32A share transfer form and the Circular Resolution are invalid, null and void and of no effect whatsoever;

(c) an injunction to restrain the 2nd defendant from registering the 4th defendant as a member of the 1st defendant company;

(d) an injunction to restrain the defendants from convening any Extraordinary General Meeting to remove the plaintiff as director of the lst defendant company and to appoint the 4th defendant or any other person as director;

(e) an injunction to restrain the defendants from howsoever acting upon the purported Form 32A and the purported Circular Resolution;

(f) an injunction to restrain the 2nd and 3rd defendants from conducting the affairs of the 1st defendant unless such affairs have been authorised by a duly convened meeting of the directors of the 1st defendant.

(g) damages as against the 2nd, 3rd and 4th defendants;

(h) costs; and

(i) any further or other orders or relief as this Honourable Court shall deem fit.

[3] The defendants' defence revolves basically on the sole ground that there is an oral agreement that the plaintiff holds the 55 shares as trustee/nominee on behalf of the 3rd defendant.

Relevant Laws:

[4] They are O. 35 rule 4 of the r. of the High Court and s. 103 Evidence Act 1950.

Order 35 rule 4(1) RHC states that:

> ... The judge before whom an action is tried may give directions as to the party to begin and the order of speeches at the trial, and, subject to any such directions, the party to begin and the order of speeches shall be that provided by this rule ...

[5] Order 35 r. 4(2) RHC states that:

> ... Subject to paragraph (6) the plaintiff shall begin by opening his case …

[6] Order 35 rule 4(6) RHC states that:

> ... Where the burden of proof of all the issues in the action lies on the defendant or, where there are two or more defendants and they appear separately or are separately represented, on one of the defendants, the defendant or that defendant, as the case may be, shall be entitled to begin, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between, him and the plaintiff as if for references to the plaintiff and the defendant there were substituted reference to the defendant and plaintiff respectively ...

[7] Section 103 Evidence Act 1950 states as follows:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

Contentions Of Counsels

[8] The plaintiff's counsel, Mr George Lo, submits in his words as follows:

> In a nutshell, the principal issue before this Honourable Court is whether there is any truth in the defendants' allegation that there was an oral agreement made between the plaintiff and the 3rd defendant that the plaintiff would hold the 55% share as trustee and nominee for the 3rd defendant. The impugned transfer is merely evidence of such alleged trust or nominee relationship. The subsidiary issue is whether the signature appearing on the transfer belongs to the plaintiff. The burden of proving the principal and subsidiary issues fall squarely on the defendants. See: *Utama Merchant Bank Berhad v. Dato' Mohd Nadzmi Mohd Salleh* at page 867 para d - g.

[9] For the defendant's counsel, Mr Lim Heng Choo refers to the pleadings and submits that there are several issues stemming from the plaintiff's statement of claim. These issues concern forgery and conspiracy to defraud in respect of the two documents. Relying on O. 35(6) of RHC and the case of *Chong Chee Yan v. Germila Sdn Bhd & Anor* [2001] 6 CLJ 8, he submits that since these issues are alleged by the plaintiff it is incumbent on the plaintiff to prove them and hence they should start their case.

Finding Of The Court

[10] The primary issue in this suit in my judgment is whether or not the plaintiff is holding the 55 shares as trustee/nominee on behalf of the 3rd defendant. There is no dispute that the legal and registered ownership of the 55 shares lies with the plaintiff and in my view based on that, there is prima facie evidence before this court that the plaintiff is also the beneficial owner. It is then incumbent on the defendant to dislodge that evidence by proving that there is in fact an oral agreement that the plaintiff is in fact a trustee/nominee for the 3rd defendant. The allegation of an oral agreement is made by the defendant relying on certain pre signed documents by the plaintiff which he states are forgery. Section 103 of the Evidence Act provides that if a person wishes the court to believe the existence of a particular fact, the burden lies on him to prove it. An example of the application of s. 103 is the case of *Juahir bin Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1, where Siti Norma Yaacob JCA (as she then was) at p. 9 states:

> ... The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence.
>
> He who alleges must prove such allegation and the onus is on the appellant to do so. See s. 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s. 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.

[11] In respect of the submission that since it is the plaintiff who alleges forgery and conspiracy to defraud, the burden is on him to prove those allegations and hence he should start this case. With respect, I disagree. Those allegations, which are part of the statement of claim, came about only after the plaintiff was served with the requisition of the EGM and from the results of the enquiry made by the plaintiff from the defendant's accountant concerning the status of his shares in the 1st defendant. The plaintiff was informed that prior to the incorporation of

A the lst defendant, he had pre-signed a blank transfer of his entire shareholding with the clear understanding that the 3rd defendant could transfer the plaintiffs shares whenever and to whoever the 3rd defendant wishes. There is also the existence of a Form 32A and the Circular Board Resolution bearing his signatures. After having sight of those
B documents, he took out this suit seeking declarations that those documents are invalid on the ground that his signatures on the documents were forged. Those signatures were not attested by anyone. The defendants of course are relying on the same documents to prove their case. As stated earlier by me, the fact that the 55 shares are
C registered in the name of the plaintiff is *prima facie* evidence that he should be treated as the beneficial as well as the registered owner unless proven otherwise and since it is the defendants who allege that there is an oral agreement saying otherwise it is incumbent on them to prove the aforesaid oral agreement. The plaintiff could have very well only pleaded that he is the registered owner of the 55 shares and requested
D for the declarations as sought here. No doubt the defendants would then allege that there is an oral agreement based on the aforesaid documents. In such a circumstance, there is no doubt that the defendants would be requested to start their case. That scenario is no different to the present case except that the plaintiff because of the discovery of those
E documents and taking a cautious approach pleaded the reasons why those documents cannot be relied on by the defendants.

[12] Accordingly I hereby order the defendants to start first to prove their claim that there is an oral agreement that the plaintiff holds the 55
F shares as trustee/nominee for the 3rd defendant.

[13] No order as to costs.

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